AMBIGA SREENEVASAN v. DIRECTOR OF IMMIGRATION SABAH, NOOR ALAM KHAN A WAHID KHAN & ORS

COURT OF APPEAL, KOTA KINABALU
MOHD ZAWAWI SALLEH JCA
ABANG ISKANDAR JCA
AHMADI ASNAWI JCA
[CIVIL APPEAL NO: S-01(IM)(NCVC)-362-11-2015]
7 JUNE 2017

ADMINISTRATIVE LAW: *Judicial review – Statutory authority – Denial of entry into Sabah – Issuance of notice of refusal – Certiorari – Mandamus order for permission to enter – Whether decision amenable to judicial review – Whether fettered by ouster clause in statutes – Immigration Act 1959/63, s. 59A*

CONSTITUTIONAL LAW: *Fundamental liberties – Right to be heard – Applicant denied entry into Sabah – Whether applicant should be given opportunity to be heard – Whether reasons should be given for denial of entry – Whether forming part of personal liberty of a citizen – Whether imposing a duty upon public decision-maker to act fairly – Whether there was violation of arts. 5(1) or 8(1) of Federal Constitution – Immigration Act 1959/63, ss. 59 & 65*

The appellant intended to travel to Sabah on 25 November 2014 to speak at a forum. The said forum was held at Kota Kinabalu ('the KK Forum'). The appellant wrote a letter dated 11 November 2014 to the first respondent to obtain confirmation that there would be no restriction for the appellant to enter Sabah. On 14 November 2014, the first respondent replied that the appellant's application had been referred to the State Authority and was rejected. The appellant then wrote a letter to the first respondent on 3 December 2014, asking for the reasons as to why she was barred from entering Sabah. There had been no reply to the appellant's letter dated 3 December 2014. The appellant then filed an application for judicial review, seeking, *inter alia*, (i) an order of *certiorari* to quash the Notice of Refusal of Entry into Sabah dated 14 November 2014 ('the impugned decision'); and (ii) an order of *mandamus* to compel the respondents to allow the appellant entry into Sabah. The Judicial Commissioner ('JC') dismissed the appellant's application for judicial review on two grounds, namely, that the (i) ouster clause in s. 59A of the Immigration Act 1959/63 ('the Act') in clear and explicit terms provide that any act done or decision made by the State Authority under the Act was not subject to judicial review except on grounds of procedural non-compliance of the requirements of the Act; and (ii) focus of the court was to consider the decision-making process, and not whether the impugned decision was fair and reasonable. Dissatisfied with the decision of the JC, the appellant appealed. The nub of the appellant's submission was that the JC erred in relying on the case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* ('*Sugumar*'s case) in support of his conclusion that the

decision of the State Authority was non-justiciable ('justiciability issue') Further, the appellant submitted that in any event, *Sugumar*'s case was bad law as the current approach was that the court may consider itself not to be bound by ouster clauses, particularly where there was error of law. Concerning the merit issue, the appellant submitted that the JC's decision ought to be quashed on four separate grounds, namely, that the (i) respondents breached the appellant's fundamental liberty as guaranteed by the Federal Constitution; (ii) respondents acted in excess or without jurisdiction, *ultra vires*, or with *mala fide* or abused power; and (iii) respondents violated the appellant's legitimate expectations. The issue that arose for determination was whether it was possible to exclude the jurisdiction of the courts by the use of provisions like s. 59A of the Act.

Held (dismissing appeal with no order as to costs)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The words of s. 59A(1) of the Act are clear and support the conclusion that the jurisdiction of the court is ousted, except on grounds of procedural non-compliance of the requirements of the Act or regulations governing the Act or decision and nothing else. Therefore, the intention of Parliament to exclude judicial review is clearly manifested by the unmistakable and unambiguous language of s. 59A(1) of the Act. (para 17)

(2) The court was not persuaded that the decision in *Sugumar*'s case was wrong and that the court should depart from it. The questions of law posed for determination in *Sugumar*'s case and in this instant appeal are the same. *Sugumar*'s case made a clear pronouncement on two issues: (i) by deliberately spelling out that there shall be no judicial review, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act; and (ii) by virtue of s. 59A(1) of the Act, the court shall be precluded from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the Act on ground/fairness. Therefore, the doctrine of precedent dictates that cases must be decided in the same way when their material facts and issues are the same. (para 34)

(3) Concerning the appellant's allegation that the respondents had breached the appellant's fundamental liberty as guaranteed under arts. 5(1), 8(1) and 9(2) of the Federal Constitution, the Federal Court in *Sugumar*'s case had already canvassed these issues. Further, the appellant's contention that the respondents breached the appellant's fundamental liberties touched on the issue of substantive grounds/fairness. The doctrine of substantive fairness cannot be invoked as a separate or additional ground of judicial review of an administrative decision when Parliament had expressly excluded judicial review under the Act. Therefore, the appellant's submission on merit issue was not well founded. (paras 43-45)

(4) As a general principle, persons affected by administrative decisions have a right to know the reasons on which they are based, in short, to understand them. At the very least, the decision-maker must be able to justify his/her decision. However, in this instant appeal, statutorily, the respondents were not required to give reasons as affirmed by the Federal Court in *Sugumar*'s case. (paras 47 & 49)

(5) The right to be heard is not stipulated or provided in ss. 59 and 65 of the Act; s. 59 of the Act provides that any order of the State Authority does not require the giving of an opportunity to be heard. Further, the first respondent has no discretion but to refuse the entry as directed by the State Authority. Hence, the act or the decision of the first respondent also enjoys the exclusion of the right to be heard. In the circumstances, the first respondent and the State Authority cannot be said to have deprived the appellant of the right to justice as there cannot be any breach where none exist in law. (para 50)

(6) Although the appellant had travelled to Sabah in the past and she was allowed entry into Sabah without objection or obstruction; still that could not be made as a basis for the appellant to rely on the doctrine of legitimate expectation since: (i) it was never stated in the appellant's affidavits as to the purpose of her past visits; and (ii) there was nothing in the appellant's affidavits to show that there was a promise or representation ever made by the respondents in the past that her entry to Sabah for the alleged purpose under s. 67 of Act would not be refused. In addition, legitimate expectation cannot and should not override the express statutory power vested in the State Authority. Therefore, no substantive legitimate expectation arose in the appellant's favour. (para 54)

Bahasa Malaysia *Headnotes*

Perayu bercadang untuk pergi ke Sabah pada 25 November 2014 untuk berucap dalam satu forum. Forum tersebut diadakan di Kota Kinabalu ('Forum KK'). Perayu menulis sepucuk surat bertarikh 11 November 2014 kepada responden pertama untuk mendapatkan pengesahan bahawa tiada sebarang sekatan untuk perayu masuk ke Sabah. Pada 14 November 2014, responden pertama menjawab permohonan perayu dan menyatakan bahawa permohonan perayu telah dirujuk kepada Pihak Berkuasa Negeri dan permohonan tersebut ditolak. Perayu kemudiannya menulis sepucuk surat kepada responden pertama pada 3 Disember 2014, menanyakan alasan bagi melarangnya memasuki Sabah. Surat perayu bertarikh 3 Disember 2014 tidak dijawab. Perayu kemudiannya memfailkan permohonan untuk semakan kehakiman, antara lain, untuk (i) perintah *certiorari* untuk megetepikan Notis Penafian Kemasukan ke Sabah bertarikh 14 November 2014 ('keputusan'); dan (ii) perintah *mandamus* untuk memaksa responden membenarkan perayu

masuk ke Sabah. Pesuruhjaya Kehakiman ('JC') menolak permohonan perayu untuk semakan kehakiman berdasarkan dua alasan, iaitu, (i) klausa penyingkiran dalam s. 59A Akta Imigresen 1959/63 ('Akta') jelas menyatakan bahawa apa-apa perbuatan yang dilakukan atau keputusan yang dibuat oleh Pihak Berkuasa Negeri di bawah Akta tersebut tidak tertakluk kepada semakan kehakiman kecuali atas sebab-sebab ketidakpatuhan prosedur terhadap kehendak Akta; dan (ii) tumpuan mahkamah adalah untuk mempertimbangkan proses membuat keputusan, dan bukan sama ada keputusan yang dibuat adalah adil dan munasabah. Tidak berpuas hati dengan keputusan JC, perayu merayu. Hujahan utama perayu adalah bahawa JC terkhilaf apabila bersandar atas kes *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* ('kes *Sugumar*') untuk menyokong dapatannya bahawa keputusan Pihak Berkuasa Negeri tidak wajar ('justiciability issue'). Selanjutnya, perayu menghujahkan bahawa dalam apa jua keadaan, kes *Sugumar* menyalahi undang-undang kerana pendekatan semasa adalah bahawa mahkamah boleh menganggap bahawa ia tidak terikat dengan klausa penyingkiran, terutama jika ada kesalahan undang-undang. Mengenai isu merit, perayu menghujahkan bahawa keputusan JC sepatutnya dibatalkan berdasarkan empat alasan berasingan, iaitu, (i) responden melanggar kebebasan asas perayu yang dijamin oleh Perlembagaan Persekutuan; (ii) responden bertindak secara berlebihan atau tanpa bidang kuasa, *ultra vires*, atau dengan *mala fide* atau kuasa yang disalahgunakan; dan (iii) responden melanggar harapan sah perayu. Isu yang dibangkitkan untuk pertimbangan adalah sama ada bidang kuasa mahkamah boleh dikecualikan dengan mengguna pakai peruntukan seperti s. 59A Akta.

Diputuskan (menolak rayuan tanpa perintah untuk kos)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Peruntukan s. 59A(1) Akta adalah jelas dan menyokong kesimpulan bahawa bidang kuasa mahkamah tersingkir, kecuali atas dasar ketidakpatuhan prosedur terhadap kehendak Akta atau peraturan yang mengawal Akta atau keputusan dan tidak ada yang lain. Oleh itu, niat Parlimen untuk mengecualikan semakan kehakiman jelas dinyatakan oleh bahasa yang amat jelas dalam s. 59A(1) Akta.

(2) Mahkamah tidak yakin bahawa keputusan kes *Sugumar* adalah salah dan mahkamah harus menyimpang daripadanya. Persoalan undang-undang yang ditimbulkan untuk penentuan dalam kes *Sugumar* dan dalam rayuan ini adalah sama. Kes *Sugumar* membuat pengisytiharan yang jelas mengenai dua isu: (i) dengan menghuraikan secara jelas bahawa tidak boleh ada semakan kehakiman, Parlimen sememangnya meniatkan bahawa seksyen ini adalah konklusif atas pengecualian semakan

kehakiman di bawah Akta; dan (ii) menurut kuasa s. 59A(1) Akta, mahkamah hendaklah dihalang daripada menjalankan kuasa semakan kehakiman untuk memeriksa kesahihan pelaksanaan kuasa pentadbiran yang diberikan oleh Akta atas dasar keadilan. Oleh itu, doktrin duluan memperuntukkan bahawa kes-kes mesti diputuskan dengan cara yang sama apabila fakta dan isu-isu materialnya adalah sama.

(3) Mengenai hujahan perayu bahawa responden telah melanggar kebebasan asas perayu seperti yang dijamin di bawah per. 5(1), 8(1) dan 9(2) Perlembagaan Persekutuan, Mahkamah Persekutuan dalam kes *Sugumar* telah membahaskan isu-isu ini. Selanjutnya, hujahan perayu bahawa responden melanggar kebebasan asas perayu yang menyentuh isu dasar substantif/keadilan. Doktrin keadilan substantif tidak boleh diguna pakai sebagai alasan semakan kehakiman berasingan atau semakan kehakiman tambahan terhadap keputusan pentadbiran apabila Parlimen secara jelas telah mengecualikan semakan kehakiman di bawah Akta. Oleh itu, hujahan perayu mengenai isu merit tidak diasaskan dengan kukuh.

(4) Sebagai prinsip umum, orang-orang yang terjejas oleh keputusan pentadbiran berhak mengetahui sebab-sebab keputusan tersebut, ringkasnya, untuk memahami keputusan. Setidak-tidaknya, pembuat keputusan harus memberikan justifikasi keputusannya. Walau bagaimanapun, dalam rayuan ini, berdasarkan statut, responden tidak dikehendaki memberi alasan seperti disahkan oleh Mahkamah Persekutuan dalam kes *Sugumar*.

(5) Hak untuk didengar tidak ditetapkan atau disediakan dalam ss. 59 dan 65 Akta; s. 59 Akta memperuntukkan bahawa apa-apa perintah Pihak Berkuasa Negeri tidak memerlukan peluang untuk didengar diberi. Selanjutnya, responden pertama tidak mempunyai budi bicara tetapi untuk menolak kemasukan seperti yang diarahkan oleh Pihak Berkuasa Negeri. Oleh itu, perbuatan atau keputusan responden pertama juga mengecualikan hak untuk didengar. Dalam keadaan ini, responden pertama dan Pihak Berkuasa Negeri tidak boleh dikatakan melanggar hak perayu untuk keadilan kerana tidak boleh ada sebarang pelanggaran apabila tiada diperuntukkan tersebut dalam undang-undang.

(6) Walaupun perayu telah pergi ke Sabah pada masa lalu dan dibenarkan memasuki Sabah tanpa bantahan atau halangan; ia masih tidak dapat dijadikan asas bagi perayu bergantung pada doktrin harapan yang sah kerana: (i) tidak pernah dinyatakan dalam afidavit perayu tujuan lawatannya yang lalu; (ii) tiada apa-apa dalam afidavit perayu untuk menunjukkan bahawa terdapat janji atau perwakilan yang pernah dibuat oleh responden pada masa lalu bahawa kemasukannya ke Sabah untuk

tujuan yang didakwa di bawah s. 67 Akta tidak akan ditolak. Di samping itu, harapan sah tidak boleh dan tidak akan mengatasi kuasa berkanun jelas yang terletak pada Pihak Berkuasa Negeri. Oleh itu, tiada harapan sah yang substantif timbul yang memihak kepada perayu.

Case(s) referred to:

Abdul Salam Husin v. Majlis Angkatan Tentera & Anor [2011] 2 CLJ 1 FC ***(refd)***
Anisminic Ltd v. Foreign Compensation Commission [1968] UKHL 6 ***(refd)***
BODCO Engineering & Construction Sdn Bhd v. Christopher Matthew Matthius [2016] 7 MLJ 275 ***(refd)***
Breen v. AEU [1971] 1 All ER 1148 ***(refd)***
Bremer Vulken Schiffbau und Machinenfabrik v. South India Shipping Corp [1981] AC 909 ***(refd)***
Council of Civil Service Unions Minister Civil Service [1985] AC 374 ***(refd)***
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***
Datuk Justine Jinggut v. Pendaftar Pertubuhan [2012] 1 CLJ 825 CA ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***
Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd [2003] 3 CLJ 378 CA ***(refd)***
Kelab Lumba Kuda Perak v. Menteri Sumber Manusia Malaysia & Anor [2005] 3 CLJ 517 CA ***(refd)***
Law Pang Ching & Ors v. Tawau Municipal Council [2010] 2 CLJ 821 CA ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal [2016] 4 CLJ 12 FC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Mak Sik Kwong v. Minister of Home Affairs, Malaysia [1975] 1 LNS 96 HC ***(refd)***
Mohamed Ashraff & Anor v. The Commissioner for Federal Capital, Kuala Lumpur & Anor [1972] 1 LNS 89 FC ***(refd)***
Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***
Nadarajah v. Secretary of State for the Home Department [2005] EWCA Civ 1363 ***(refd)***
Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(refd)***
North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729 FC ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***
PP v. Yuneswaran Ramaraj [2015] 9 CLJ 873 CA ***(refd)***
R v. Higher Education Funding Council, ex p Institute of Dental Surgery [1994] 1 All ER 651 ***(refd)***
R v. North and East Devan Health Authority, ex parte Coughlan [2001] QB 213 ***(refd)***
R v. Secretary of State for the Home Department ex parte Simms [2000] 2 AC 115 ***(refd)***
Re Racal Communications [1981] AC 374 ***(refd)***
Reg v. Special Commissioner, Ex parte Morgan Grenfell [2002] UKHL 21 ***(refd)***
RV (Asha Foundation) v. the Millenium Commission [2002] EWHC 916 ***(refd)***
SIS Forum (Malaysia) v. Dato Seri Syed Ismail Syed Jaafar Albar (Menteri Dalam Negeri) [2010] 2 MLJ 377 ***(refd)***

A *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC* ***(refd)***
Sugumar Balakarishnan v. Pengarah Imigresen Negeri Sabah & Anor And Another Appeal [1998] 3 CLJ 85 CA ***(foll)***
Sweeney v. The Department of Highways [1933] OWB 78 ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***
B *UMW Equipment Sdn Bhd v. Parantaman Ramasamy & Anor [2014] 5 CLJ 906 CA* ***(refd)***
Woolfrey v. Piche [1958] 13 DLR (2nd) 605 ***(refd)***
Zakiah Ishak v. Majlis Daerah Hulu Selangor [2005] 4 CLJ 77 CA ***(refd)***

Legislation referred to:
C Civil Law Act 1956, s. 3(1)
Federal Constitution, arts. 5(1), 8(1), 9(2), 121(1), 160(2)
Immigration Act 1959/63, ss. 59, 59A(1), 65(1), 66, 67
Pengurusan Danaharta Nasional Berhad Act 1998, s. 72

Other source(s) referred to:
D Mark Aronson & Bruce Dyer, *Judicial Review of Administrative Action,* 2nd edn, 2000, p 678
Peter Leyland, *Gordon Anthony [2009], Legitimate Expectation; Textbook on Administrative Law,* (6th ed.), Oxford New York, NY: Oxford University Press, pp 313-330, 313
Woolf, *Protection of the Public,* p 92

E *For the appellant - Michael Chow; M/s Idrus & Tsai*
For the 1st respondent - Rahazlan Affandi Abdul Rahim; SFC
For the 2nd, 3rd & 4th respondents - Md Hanafiah Md Kassim; SSC, Kota Kinabalu

[Editor's note: Appeal from High Court, Kota Kinabalu; Application for Judicial Review No: BKI-13NCVC-6/1-2015(HC2) (affirmed).]

F *Reported by Sandra Gabriel*

JUDGMENT

Mohd Zawawi Salleh JCA:

G

Introduction

[1] This appeal is directed against the decision of the learned Judicial Commissioner ("JC") of the High Court of Sabah and Sarawak at Kota Kinabalu, dated 15 March 2016, dismissing the appellant's application for
H judicial review dated 28 January 2015 with no order as to costs.

[2] We heard the appeal on 20 July 2017, at the end of which we unanimously dismissed the appeal and affirmed the decision of the learned JC. We now give the detailed reasons for our decision.

I

Facts Of The Case

[3] The facts giving rise to this appeal, as culled from the written submissions of the parties, may be summarised as follows:

(a) The appellant intended to travel to Sabah on 25 November 2014 to speak at a forum. The said forum was to be held at Kota Kinabalu ("the KK Forum") and was organised by "Negara-Ku", a people's movement advocating national unity.

(b) The appellant wrote a letter dated 11 November 2014 to first respondent to obtain confirmation that there would be no restriction for her to enter Sabah.

(c) On 14 November 2014, the first respondent replied that the appellant's "application" had been referred to the State Authority ("Pihak Berkuasa Negeri") and was rejected.

(d) It was alleged by the appellant that:

(i) the sole purpose of her intended trip to Sabah was to participate in the KK Forum;

(ii) other speakers of the KK Forum from West Malaysia were allowed to enter Sabah; and

(iii) the appellant had, in the past, entered Sabah without objection or obstruction from the Sabah State Authority.

(e) The appellant then wrote a letter to the first respondent on 3 December 2014, asking for the reasons she was barred from entering Sabah.

(f) There has been no reply to the appellant's letter dated 3 December 2014.

(g) The appellant then filed an application for judicial review, seeking the following reliefs:

(i) an order of *certiorari* to quash the notice of refusal of entry into Sabah dated 14 November 2014 ("the impugned decision").

(ii) an order of *mandamus* to compel the respondents to allow the appellant's entry into Sabah;

(iii) damages;

(iv) costs; and

(v) further relief as deemed fit and proper.

(h) The learned JC dismissed the appellant's application for judicial review on two grounds. The first was that the ouster clause in s. 59A of the Immigration Act 1959/63 ("Act 155") in clear and explicit terms provide that any act done or decision made by the State Authority under

A the Act is not subject to judicial review except on grounds of procedural non-compliance of the requirements of the Act. The second was that the focus of the court was to consider the decision-making process, and not whether the impugned decision was fair and reasonable.

(i) Being dissatisfied with the decision of the learned JC, the appellant B appealed to this court. Hence, this appeal.

Parties' Competing Submissions

[4] The nub of the appellant's submission was that the learned JC erred in relying on the case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105; [2002] MLJ 72 ("*Sugumar*'s case) in C support of his conclusion that the decision of the State Authority was non-justiciable ("justiciability issue").

[5] Further, it was boldly submitted that in any event, *Sugumar*'s case was bad law for the following reasons:

D

(a) The current approach is that the court may consider itself not to be bound by ouster clauses, particularly where there is error of law. In *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317, the Court of Appeal refused to follow the Privy Council's decision in *Anisminic Ltd v. Foreign* E *Compensation Commission* [1968] UKHL 6 on the ground that the Board had failed to truly appreciate the effect of the earlier House of Lords decision in *Anisminic* that had jettisoned the esoteric and obsolete distinction between errors of laws that went to jurisdiction and error of laws that did not.

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(b) Relying on, *inter alia*, the House of Lords cases of *Re Racal Communications* [1981] AC 374 and *O'Reilly v. Mackman*, the Court of Appeal recast our common law as follows:

> An inferior tribunal or other decision-making authority, whether G exercising a *quasi*-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair H procedure or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision ...
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunised from judicial review by an ouster clause however widely drafted. I

(c) The Court of Appeal went on to declare that the "categories of errors of law are not closed":

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

(See also *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1) (FC); *UMW Equipment Sdn Bhd v. Parantaman Ramasamy & Anor* [2014] 5 CLJ 906; [2014] 3 MLJ 457; *BODCO Engineering & Construction Sdn Bhd v. Christopher Matthew Matthius* [2016] 7 MLJ 275).

(d) In support of her submission that *Sugumar*'s case was bad law and should not be followed, the appellant placed reliance on the decision of the Federal Court in *Lee Kwan Woh v. Public Prosecutor* [2009] 5 CLJ 631; [2009] 5 MLJ 301 (FC), wherein the court stated at p. 639 (CLJ); p. 311 (MLJ), para 8:

> ... it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II.

(e) Reliance was also placed on the decision of the Federal Court in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333, wherein the Federal Court had this to say:

> [5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art. 10(2)(c). It says that 'Parliament may by law impose ... (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Now although the article says 'restrictions', **the word 'reasonable' should be read into the provision** to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment.
>
> (emphasis added).

(f) It was contended by the appellant that in *Sivarasa Rasiah (supra)*, the Federal Court stated in clear and unequivocal terms that the approach in *Sugumar*'s case "must be rejected as being without merit" in respect of the narrow and restricted meaning of art. 5(1) of the Federal Constitution.

(g) The appellant also posited that the learned JC wrongly construed the intention of Parliament. Parliament's intention in introducing s. 59A of Act 155 was to curb problem caused by illegal immigration. As such, *Sugumar*'s case should not be applied and/or followed.

[6] Concerning merit issue, the appellant submitted that the learned JC's decision ought to be quashed on four (4) separate grounds as follows:

(i) that the respondents breached the appellant's fundamental liberty as guaranteed by the Federal Constitution;

(ii) that the respondents acted in excess or without jurisdiction, *ultra vires*, or with *mala fide* or abused power;

(iii) that the respondents violated the appellant's legitimate expectations; and

(iv) that the respondents acted in a "*Wednesbury* unreasonableness" manner.

[7] In reply, learned Senior Federal Counsel appearing for the respondents submitted that the provisions of ss. 59, 59A, 65, 66 and 67 of Act 155 are very clear. Thus, it is incumbent upon this court to give effect to those provisions without attempting to modify and qualify them, particularly where there is no ambiguity (see *Abdul Salam Husin v. Majlis Angkatan Tentera & Anor* [2011] 2 CLJ 1).

[8] As regards merit issue, Senior Federal Counsel submitted that since the first respondent's decision was made in compliance with the direction given by the State Authority and/or in accordance with the law, the question that the respondents had violated the articles of the Federal Constitution did not arise. The respondents relied heavily on the decision of *Sugumar*'s case.

[9] The respondents posited that s. 65 of Act 155 does not impose a statutory duty on the respondents to give reasons to the appellant or that the first respondent is required to afford the appellant an opportunity to be heard. It was contended by the respondents that there cannot be any breach where none of such rights exist in law (see *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777).

[10] Concerning legitimate expectation, the respondents submitted that it was never averred in the appellant's affidavit and/or the contention was an afterthought. In any event, legitimate expectation cannot and should not override the express statutory power vested in the State Authority (see *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729 (FC)).

Our Decision

Legal Framework

[11] Section 59A(1) of Act 155 provides:

> 59A(1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysia State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of the Act or the regulations governing that act or decision.

[12] Section 59A(1) of Act 155 is drafted in the widest possible terms. It specifically provides for the exclusion of judicial review in any court of any act done or any decision made by the Minister or the Director-General, or in the case of an East Malaysian State, the State Authority, under the Act, save for non-procedural compliance.

[13] As a general principle, there is a long list of authorities in support of the view that where rights are taken away by legislation, this should be done unambiguously. Such an approach accords with the settled statutory rule of construction that if Parliament is to enact a law that takes away rights or liberties, it must clearly say so.

[14] In *Sugumar*'s case, the Federal Court stated at pp. 125 and 126 as follows:

> Thus, it is clear from the explanatory statement that the intention of Parliament in amending s. 59A by providing new provisions is to exclude judicial review by the court of any act done or any decision ...
>
> ... the language in the present s. 59A is explicit with respect to the exclusion of the judicial review by any court of any act or decision made by the Minister, Director General or the State Authority under the Act except for non-compliance of any procedural requirement. Judicial review under the section is defined to include proceedings commenced by way of an application, writ or any other suit or action mentioned in para (2) of s. 59A. By deliberately spelling out that there shall be no judicial review by the court of any act or decision of the Minister or the decision-maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act.

[15] In the same vein, in *Reg v. Special Commissioner, Ex parte Morgan Grenfell* [2002] UKHL 21, a case relating to legal professional privilege, the House of Lords said:

> ... the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication.

[16] Lord Hoffman in *R v. Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115 has observed that:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[17] In our view, the words of s. 59A(1) of Act 155 are clear and support the conclusion that the jurisdiction of the court is ousted, except on grounds of procedural non-compliance of the requirements of the Act or regulations governing the act or decision and nothing else. Therefore, the intention of Parliament to exclude judicial review is clearly manifested by the unmistakable and unambiguous language of s. 59A(1) of Act 155.

Ouster Clauses

[18] Broadly speaking, ouster clauses are legislative provisions that purport to prevent certain administrative decisions from being subject to judicial review. Such clauses thus serve as a signal to decision-makers that they may operate without fear and intervention by the courts at a later stage. One common kind of ouster clause is the total ouster or finality clause, which is inserted into a statute to indicate that the decision of a particular tribunal or authority is final and cannot be challenged in any court (See Mark Aronson & Bruce Dyer, *Judicial Review of Administrative Action* (2nd edn; 2000) at 678).

[19] The question of how they should be construed by the courts is a complex one. It involves looking at unusual history of the operation of the clauses, and the complicated concepts of the proper limits of the executive power, the notion of "Parliamentary Supremacy", the role of Judiciary and the importance of the public law value underlying judicial review.

[20] The main legal issue with ouster clause is whether it is in fact possible to exclude the jurisdiction of the courts by the use of carefully drafted provisions like s. 59A of Act 155.

[21] The Malaysian court's approach in dealing with ouster clauses is discussed, *inter alia*, in *Sugumar*'s case. The case concerned the decision of the Sabah Immigration Authority to cancel the entry permit of the appellant to reside in the State of Sabah. The appellant subsequently sought judicial

review of the administrative decision of the Sabah Immigration Authority *via certiorari*. The Court of Appeal (see *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85; [1998] 3 MLJ 289 (CA)) held that the personal liberty under art. 5(1) of the Federal Constitution included the liberty of an aggrieved person to seek relief in court (*inter alia*, *via* judicial review). Thus, a statutory provision ousting the powers of judicial review, would be inconsistent with this fundamental liberty of access to the Judiciary.

[22] It was also held that statutory ouster clauses shall only apply in a limited sense to those administrative acts and decisions not infected by an error of law. In addition, Gopal Sri Ram JCA (as he then was) held that an administrative decision may be reviewed on the grounds of substantive fairness (ie, the decision must be "reasonable" and the punishment imposed should not be disproportionate to the alleged wrongdoing).

[23] It is pertinent to note that Federal Court subsequently reversed the decision of the Court of Appeal (see *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105; [2002] MLJ 72 (FC)). The Federal Court held that the constitutional rights under art. 5(1) of the Federal Constitution can be removed in accordance with law as constitutional rights are not absolute. It was held that the effect of the ouster clauses was clearly intended by the Parliament to remove judicial review. Thus, the right to justice cannot be sustained in the face of an express statutory ouster of judicial review.

[24] Another important case is *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378; [2003] 3 MLJ 1 ("*Danaharta* case"). The case involved the non-availability of judicial remedies (injunctions) against the Malaysian national asset company, Pengurusan Danaharta Nasional Berhad ("Danaharta") in the wake of the Asian economic crisis pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998 ("Danaharta Act"). The salient facts are as follows: a bank lent monies to a borrower and in order to secure the loan, the plaintiff created a third party charge over certain pieces of land in favour of the bank. The borrower defaulted on the payment and judgment in default was obtained against the borrower. The bank subsequently issued the plaintiff a fresh notice demanding payment for the sum owing by the borrower to the bank. Whilst the loan remained unpaid, the Danaharta Act came into force. As a result, the loan and charge, under which rights and remedies originally vested in the bank, became vested in Danaharta Urus Sdn Bhd (the wholly-owned subsidiary of Danaharta) *via* the Danaharta Act.

[25] The plaintiff's application for an interlocutory injunction against the defendant to restrain the latter from selling the charged land was dismissed by the High Court. The High Court held that it had no jurisdiction to issue the injunction under s. 72 of the Danaharta Act. Essentially, s. 72 bars a court from making an order to stay, restrain or affect the powers and actions of Danaharta. The ambit of the provision is indeed very wide. It applies not merely to Danaharta, but a whole host of other entities mentioned in s. 72. Apart from injunctions, it could also apply to orders for *mandamus* and *certiorari.* The width and applicability of s. 72 throws into greater relief the issue of its constitutionality.

[26] On appeal, the Malaysian Court of Appeal in *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378; [2003] 3 MLJ 1 (CA)) reversed the High Court's decision. The Court of Appeal ruled that s. 72 was unconstitutional as it violated art. 8(1) of the Federal Constitution. What is significant for our present purposes is the Court of Appeal's detailed examination of the right of access to justice in the Federal Constitution. In this regard, Gopal Sri Ram JCA ruled that the definition of "law" in the Federal Constitution is "not exhaustive", but "open ended" by reference, *inter alia*, to art. 160(2) of the Federal Constitution. The learned judge said that:

> [i]t therefore refers to a system of law that is fair and just. In our judgment, art 8(1) is a codification of Dicey's rule of law. Article 8(1) emphasises that this is a country where government is according to the rule of law ...

[27] In overruling the Court of Appeal's decision, the Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701 stated that the common law right of access to justice "cannot amount to a guaranteed fundamental right". The common law is qualified and not absolute. Unlike the Court of Appeal, the Federal Court focused on the definition of "law" in art. 160(2) of the Federal Constitution which includes "the common law insofar as it is in operation in the Federation". Hence, art. 160(2) refers to the law which has already been brought into operation as the common law of the Federation. In this regard, the Federal Court also referred to s. 3(1) of the Civil Law Act 1956, which provides that, except as otherwise provided in other written law, the Malaysian courts shall apply the common law of England and the rules of equity as administered in England as of 7 April 1956 (in respect of West Malaysia) subject to local circumstances. According to the Federal Court, this meant that the common law could be modified after 7 April 1956 by written law. Thus, the right of access to justice is one that can be modified by written law (in this case, the Danaharta Act).

[28] The Federal Court also placed emphasis on art. 121(1) of the Federal Constitution. This provision states that the High Court shall have such jurisdiction and powers as may be conferred by or under Federal law. The Federal Court began by quoting Lord Diplock in *Bremer Vulken Schiffbau und Machinenfabrik v. South India Shipping Corp* [1981] AC 909 that every citizen should have a "constitutional right of access" to the courts of justice to obtain remedies.

[29] However, the Federal Court referred, in the next breath, to access to justice under art. 8(1) as a "general right", in contrast to the Court of Appeal's treatment of access to justice as a fundamental liberty under the Constitution. Whilst the Federal Court stated that arts. 8(1) and 121(1) "complement" each other, it was of the view that art. 121 on the jurisdiction and powers of the court is "clearly the dominant element which determines the boundaries of access to justice". Thus, "access to justice shall be available only to the extent that the courts are empowered to administer justice".

[30] The Federal Court proceeded to add that "the right is determined by the justiciability of the matter. If a matter is not justiciable, there is no right to access to justice in respect of that matter. Thus, Parliament can enact a Federal law pursuant to the authority conferred by art. 121(1) to remove or restrict the jurisdiction and power of the court".

[31] It was vehemently argued on behalf of the appellant that the Federal Court's decision in *Sugumar*'s case on the scope of art. 5(1) of the Federal Constitution is very narrow and restrictive. Indeed, the later Federal Court case of *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701 adopted a more liberal interpretation of art. 5(1) of the Federal Constitution. It was submitted that it is doubtful whether the decision in *Sugumar*'s case is still relevant and good law.

[32] Further, it was contended that Malaysian legal system is predicated on the rule of law. In general terms, the rule of law stands for the proposition that no one is above the law. It means the exercise of Government power is subjected to the control of the courts – and thus judicial review of administrative decisions is an important element in maintaining the rule of law.

[33] At paras. 19-24 of the appellant's written submission, the appellant submitted as follows:

> 19. It is good law in Malaysia that, with or without an ouster clause, the Courts may still judicially review decisions of the Executive. Hence, no ouster clause is absolute.
>
> 20. Further, judicial review is undertaken not just to review the decision-making process, but also to determine whether the decision was rational and reasonable.

21. It is trite that Courts will and must review any act/omission/decision/legislation that is alleged to be:

    (i) in contravention of the Federal Constitution, particularly, in violation of an individual's fundamental liberties.

    (ii) made *ultra vires* or an error of law;

    (iii) grossly disproportionate and/or excessive; or

    (iv) a violation of legitimate expectations.

22. Statute further confers power on the High Court to issue prerogative writs (eg, *certiorari*, *mandamus*), particularly for the enforcement of the rights under Part II of the FC. The learned JC was thus incorrect to render the High Court toothless in the Application.

23. To dispel any further doubt, the Courts have, time and time again, judicially reviewed Executive decisions, despite the presence of ouster clauses in the relevant legislation.

[34] We have given our anxious consideration to the submissions urged upon us on behalf of the appellant. We are not persuaded that the decision in *Sugumar*'s case was wrong and we should depart from it. Our reasons are as follows:

(a) Firstly, the facts and issues in *Sugumar*'s case and this instant appeal are the same. Doctrine of precedent dictates that cases must be decided in the same way when their material facts and issues are the same. In *Sweeney v. The Department of Highways* [1933] OWB 783 (CA), Middleton JA for the Ontario Court of Appeal stated:

> But, in my view, liberty to decide each case as you think right, with regard to principles laid down in previous similar cases, would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he know before what judge his case would come and could guess what view that judge would take on a consideration of the matter, without any regard to previous decisions.

(b) The decision in *Sugumar*'s case is not based upon grounds of public policy but on purely legal principles.

(c) There is no other precedent or decided case on s. 59A of Act 155 of equal weight which stands for the opposite proposition which this court should follow. The issues arising for determination in *Lee Kwan Wah (supra)* and *Sivarasa Rasiah (supra)* are not directly concerned with s. 59A of Act 155 or the power of the State Authority to refuse entry but on general interpretation of art. 5(1) of the Federal Constitution.

Thus, there are no two conflicting decisions of the higher court on the same issue before us. In *Woolfrey v. Piche* [1958] 13 DLR (2nd) 605, leBel J.A stated:

> ... but I am now faced with two conflicting decisions in this Court on the same point, and in that unfortunate state of things I apprehend that I must choose between them as I have done. That is what was done in *Young v. Bristol Aeroplane Co.* [1944] 1 KB 718, where three exceptions to the application of the rule in *Velazquez* (the *stare decisis* rule) were stated ... .

(d) In our view, the questions of law posed for determination in *Sugumar*'s case and in this instant appeal are the same. *Sugumar*'s case made a clear pronouncement on two (2) important issues:

(a) By deliberately spelling out that there shall be no judicial review, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act; and

(b) By virtue of section 59A(1) of Act 155, the Court shall be precluded from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the Act on substantive ground/fairness.

(e) Secondly, the Federal Court in *Sivarasa Rasiah (supra)*, barren of any reference to the earlier decision of the Supreme Court. In *Public Prosecutor v. Yuneswaran a/l Ramaraj* [2015] 9 CLJ 873; [2015] MLJ 47, this court had this to say:

> [61] With respect, in our view, the manner in which the Federal Court in *Sivarasa* went about on how to construe 'restrictions' was completely at variance with an earlier decision of the Supreme Court in *PP v. Pung Chen Choon* [1994] 1 MLJ 566 where it was held as follows [at p. 575D-H]:
>
> Insofar as restrictions on the Right to freedom of speech and expression is concerned, cl (2)(a) of art 10 permits restrictions on this Right by laws as Parliament deems necessary or expedient relating to matters undermining the security of the Federation or any part thereof, friendly relations with other countries, public order or morality or relating to defamation, incitement to any offence, contempt of court, privileges of Parliament or of any legislative assembly.
>
> Clearly, therefore, in Malaysia, the position of the court when considering an infringement of this Right is different from that of the position of the court in India when considering an infringement of the equivalent Right under the Indian Constitution.

> With regard to India, the Indian Constitution requires that the restrictions, even if within the limits prescribed, must be 'reasonable' – and so that court would be under a duty to decide on its reasonableness. But, with regard to Malaysia, when infringement of the Right of freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions. So, for example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl. 10(2)(a), the question whether it is reasonable does not arise; the law would be valid. Moreover, by cl. (2) of art 4, it is not a ground for challenge that the restriction does not relate to one of the matters specified in art. 10(2)(a) for taking a case outside the protection of that article. (See *Assa Singh v. Mentri Besar of Johore* 9 at p. 38.)
>
> To put it another way, art 4(2)(b) of the Constitution expressly prohibits the questioning of the validity of any law on the ground that such a law 'imposes restrictions as are mentioned in art 10(2) of the Federal Constitution but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in art. 10(2)'. (See *PP v. Param Cumaraswamy* 10 at p 517 col 2F-G). (emphasis added).

[35] In the same vein, the majority judgment of the Federal Court (per Md Raus Sharif PCA (now CJ) in *Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal* [2016] 4 CLJ 12 in dealing with art. 5 of the Federal Constitution stated:

> [140] I now discuss art. 5. Under this article no person shall be deprived of his life or personal liberty save in accordance with law.
>
> [141] The Court of Appeal in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 adopted a broad approach to the definition of 'life' legislated in art. 5(1). For brevity, I find no necessity in reproducing the reasoning behind that broad approach. Suffice if I regurgitate what the court said through Gopal Sri Ram JCA:
>
> > … the expression 'life' does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the rights to seek and be engaged in lawful and gainful employment …
>
> [142] The effect of the above approach (though in relation to the definition of 'life' and which regretfully failed to discuss the earlier case of *Government of Malaysia & Ors v. Loh Wai Kong (infra)*) is that under art. 5 the respondent is guaranteed of her fundamental right to livelihood; she is not to be deprived of her livelihood by a negative or restrictive

provision. Needless to say r. 10 in its current format, which negatives and restricts her rights, and acquiescing to Gopal Sri Ram's JCA point of view, would invariably infringe the respondent's constitutional rights. A

[143] Lord Suffian LP, on the other hand, in *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 LNS 22; [1979] 2 MLJ 33, when discussing the issue at hand, stated that art. 5 speaks of personal liberty and not of liberty *simpliciter*. This article only relates to the person or body of the individual. Personal liberty was held not to include certain rights, like right of travel or right to passport. The respondent there had argued that the refusal or delay in granting him a passport violated his right of personal liberty under art. 5. B

[144] In the case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105; [2002] 3 MLJ 72, this court had occasion to state: C

> In our view, the words 'personal liberty' should be given the meaning in the context of art 5 as a whole. In this respect, we adopt what has been said by Suffian LP in *Loh Wai Kong* ... D

[145] Mohamed Dzaiddin FCJ in the above case also endorsed the following words of Suffian LP, which read:

> ... In the light of this principle, in construing 'personal liberty' in art 5 one must look at the other clauses of the article, and in doing so we are convinced that the article only guarantees a person, ... from being 'unlawfully detained... It will be observed that these are all rights relating to the person or body of the individual ... E

[146] In *Lo Pui Sang And Other v. Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd Intervener and Other Appeals* [2008] 4 SLR 754, when discussing art. 9(1) of the Singapore Constitution (in *pari materia* with art. 8(1) of the Federal Constitution), Choo Han Teck J said: F

> I do not think that the phrase 'personal liberty' in Article 9 was a reference to a right of personal liberty to contract. It has always been understood to refer only to the personal liberty of a person against unlawful incarceration or detention. (emphasis added). G

[147] It cannot be overly emphasised that the Federal Constitution has meticulously delineated matters of fundamental liberties, as set out in Part II of the Federal Constitution, consisting of arts. 5 to 13. They are provisions that:

(a) ensure the liberty of the person (art. 5); H

(b) prohibit slavery and forced labour (art. 6);

(c) provide protection against retrospective criminal laws and repeated trials (art. 7);

(d) legislate equality before the law and the rights to equal protection of the law (art. 8) regardless of citizenship; I

(e) lay down the prohibition of banishment and freedom of movement (art. 9);

(f) promulgate freedom of speech, assembly and association (art. 10);

(g) ensure freedom of religion (art. 11);

(h) confirm the rights in respect of education (art. 12); and

(i) provisions that guarantee protection to property (art. 13).

[148] Despite such guarantees, the Federal Constitution on the other hand provides that Parliament, pursuant to Part XI under art. 149, may in certain circumstances pass laws that may be inconsistent with arts. 5, 9 or 10. Under art. 150 the Yang di-Pertuan Agong under certain circumstances may proclaim an emergency and Parliament may pass laws that may be inconsistent with the provisions of the Constitution including provisions for fundamental liberties (*The Constitution of Malaysia* by M Suffian). In short, despite the liberties being fundamental and guaranteed by the Constitution 'they are not immutable or beyond the periphery of the amendatory powers of Parliament' (Federal Constitution of Malaysia commentary by KV Padmanabha Rau).

[149] A quick scrutiny of those nine articles show that each and every article, as articulated in them, has a peculiar role and purpose. I therefore am inclined to adopt the approach of Suffian LP in *Government of Malaysia & Ors v. Loh Wai Kong* that art. 5 is meant to deal with issues of personal liberty only. It should not import certain other rights, say, as elucidated above, a right to a passport or right of travel. Such rights are more akin to privileges than rights of life or personal liberty matters, which are more suitable to fall under art. 9. On that premise, with her personal liberty never compromised or in danger, I hold that the issue of livelihood in relation to her being denied admission as a Peguam Syarie falls outside the ambit of art. 5. Article 5 thus is of no help to the respondent.

[36] It is clear, therefore, that the latest Federal Court's decisions in *Public Prosecutor v. Yuneswaran a/l Ramaraj (supra)* and *Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal (supra)* had rejected the approach adopted by *Lee Kwan Wah v. Public Prosecutor (supra)* and *Sivarasa Rasiah (supra)* in interpreting art. 5(1) of the Federal Constitution. Therefore, there is no rhyme or reason for us to depart from the decision of *Sugumar*'s case. In our view, *Sugumar*'s case was correctly decided based on sound principle of law.

Merit Issue

[37] The appellant further submitted that if this court is not with her on justiciability issue, then, even limited to the wording of the ouster clause, there remains the fact that there was non-compliance with the prescribed procedure.

[38] It was vehemently contended on behalf of the appellant that the impugned decision was in excess or without jurisdiction, *ultra vires*, or with *mala fides* or abused of powers as it was made:

(a) in non-compliance of specific and express procedure; and/or

(b) in non-compliance with applicable principles relevant to the executive.

[39] As regards issue (1), it was submitted that the specific procedure for the appellant to obtain documentation to enter Sabah was to produce her IC. In spite of the appellant having complied with the prescribed procedure, the respondent refused to allow entry into Sabah. Thus, this is a clear instance of procedural non-compliance.

[40] As regards issue (b), it was contended that the respondents in carrying out their prerogative powers, are subject to the following principles:

(i) that no discretion is unfettered; and/or

(ii) that irrelevant consideration cannot be taken into account.

[41] The appellant also submitted that she had two (2) legitimate expectations:

(i) the expectation to be treated equally and to be allowed entry into Sabah again; and

(ii) the expectation that there would be valid reasons for the impugned decision and that the appellant would be given the right to be heard.

[42] Finally, the appellant posited that the respondents had a duty to give reasons for the impugned decision.

[43] We have carefully considered the submissions urged upon us on behalf of the appellant on merit issue. We are not persuaded that submissions are well founded. Most of the issues raised by the appellant had already been carefully addressed and decided in *Sugumar*'s case. In our view, this is an attempt to reargue the issues.

[44] Concerning the appellant's allegation that the respondents had breached the appellant's fundamental liberty as guaranteed under arts. 5(1), 8(1) and 9(2) of the Federal Constitution, the Federal Court in *Sugumar*'s case had already canvassed these issues and held that:

> Secondly, art. 8(1) provides that all persons are equal before the law and are entitled to the equal protection of the law. Equality before the law means the equal subjection of all persons to the law. See: *Datuk Harun bin Haji Idrus*'s case, *(supra)* at p. 117.
>
> Thirdly, art. 9(2) gives the citizen the right to move freely throughout Malaysia and to reside in any part thereof. However, these rights are subject to cl.(3), which according to *Andrew Harding's Law, Government and*

A *the Constitution in Malaysia* at p. 225, "clearly refers to Sabah and Sarawak, both of which enjoy such a special position. The purpose of the qualification is to ensure that constitutional challenges cannot be brought against these States in respect of the use of their special immigration powers, which may be used to control entry from Peninsular Malaysia. "See also *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia* B [1979] 2 MLJ 101.

It is clear from the authorities that the constitutional rights as guaranteed under art. 5(1) of the Federal Constitution can be taken away in accordance with law. Hence, s. 59 of the Act, which removes the *audi alterem partem* rule, which was duly enacted by Parliament is valid and C constitutional.

In view of the presumption of constitutionality of an Act of Parliament and here the burden of showing otherwise is on the respondent which he has not satisfied us, it is our conclusion that s. 59 of the Act is valid and constitutional.

D (emphasis added).

[45] Further, the appellant's contention that the respondents breached the appellant's fundamental liberties touched on the issue of substantive grounds/fairness. The doctrine of substantive fairness cannot be invoked as a separate or additional ground of judicial review of an administrative E decision when Parliament had expressly excluded judicial review under the Act. The Federal Court had stated conclusively in *Sugumar*'s case at pp. 126-128 as follows:

We pause to note here that the Court of Appeal seems to introduce the doctrine of substantive fairness as a separate ground in its review of the F administrative decision of the state authority under the Act by invoking art. 8(1) read together with art. 5(1) of the Federal Constitution. The Court also relied on *Rama Chandran*. See pp 125 and 128.

... we cannot agree with the Court of Appeal that the doctrine of substantive fairness can be invoked as a separate or additional ground of G judicial review of an administrative decision. Here, on a clear wording of s. 59A, in our view, Parliament must have intended to conclusively exclude judicial review except on procedural defect under the Act or regulations made thereunder.

Duty To Give Reason

H **[46]** The appellant submitted that the trend of law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. In support of her submission, reliance was placed on the following cases:

I

(i) *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1;

(ii) *Datuk Justine Jinggut v. Pendaftar Pertubuhan* [2012] 1 CLJ 825; [2012] 3 MLJ 212;

(iii) *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia Malaysia & Anor* [2005] 3 CLJ 517; and

(iv) *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481.

[47] As a general principle, we agree with the proposition that persons affected by administrative decisions have a right to know the reasons on which they are based, in short, to understand them. At the very least, the decision-maker must be able to justify his/her decision. Indeed, Lord Woolf regards "the giving of satisfactory reasons for a decision as being the hallmark of good administration". (See Woolf, *Protection of the Public*, p. 92). The giving of reasons is considered to be inextricably bound up with natural justice or the right to be fairly heard and is fundamentally important as a public law principle. It has been described by Lord Denning MR in *Breen v. AEU* [1971] 1 All ER 1148, 1154 as "one of the fundamentals of good administration".

[48] Having said that, we hasten to add that the common law duty to give reasons has not found favour in most Commonwealth jurisdictions. The disadvantages of giving reasons were outlined by Sedley J in *R v. Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651 at 665 and restated in 2003 in *R V (Asha Foundation) v. the Millenium Commission* [2002] EWHC 916 (Admin):

> It may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge.
>
> It has also been said that the great majority of cases are not likely to raise substantial points of law and the requirement is also an undue drain on resources.

[49] In this instant appeal, statutorily, the respondents were not required to give reasons as affirmed by the Federal Court in *Sugumar*'s case at pp. 107-108 (held 4):

(i) Section 65 of Act 155 does not impose an express statutory duty on the respondents to give reasons to the appellant;

(ii) the first respondent could not be expected to provide reasons to the appellant since he was merely carrying out the directions of the State Authority;

(iii) accordingly, in the exercise of the powers conferred upon the State Authority by s. 65(1) of the Act 155, the State Authority was not required to give reasons; and

(iv) it followed, therefore, that any reasons furnished by the State Authority later in court proceedings cannot also be examined and taken into account.

Right To Be Heard

[50] In this instant appeal, it would be pertinent to note the following:

(i) the right to be heard is not stipulated or provided in ss. 59 and 65 of Act 155;

(ii) section 59 of Act 155 provides that any order of the State Authority does not require the giving of an opportunity to be heard. In this instant appeal, the first respondent has no discretion but to refuse the entry as directed by the State Authority. Hence, the act or the decision of the first respondent also enjoys the exclusion of the right to be heard;

(iii) the first respondent and the State Authority cannot be said to have deprived the appellant of the right to the natural justice as there cannot be any breach where none exist in law. (See *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777, at p. 779); and

(iv) in the absence of any provision as to the mode of inquiry/right to be heard in s. 65 of Act 155, no question of failure to observe the principles of natural justice could arise. (Per Ong Hock Sim FJ at p. 72 in *Mohamed Ashraff & Anor v. The Commissioner for Federal Capital, Kuala Lumpur & Anor* [1972] 1 LNS 89; [1972] 2 MLJ 69). Per Abdoolcader J at pp. 172-173 in *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 1 LNS 96; [1975] 2 MLJ 168.

Legitimate Expectation

[51] It was submitted that the legitimate expectation of the appellant in this case is two-fold:

(i) legitimate expectation to be treated equally and to be allowed entry into Sabah as had occurred previously; and

(ii) legitimate expectation that there are good reasons for the impugned decision and that the appellant would be given the right to be heard.

[52] The principle of legitimate expectation has been accepted by our law (see, *inter alia*, *Law Pang Ching & Ors v. Tawau Municipal Council* [2010] 2 CLJ 821; *SIS Forum (Malaysia) v. Dato Seri Syed Ismail bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377. The doctrine of legitimate expectation protects both procedural and substantive rights.

[53] The doctrine of legitimate expectation originates from common law principles of fairness. English courts developed this doctrine clearly to encourage good administration and prevent-abuses by decision-makers (see Peter Leyland, Gordon Anthony [2009], *Legitimate Expectation;* Textbook on Administrative Law (6th ed.), Oxford New York, N.Y: Oxford University Press, pp. 313-330 at 313). Generally, the courts will grant judicial review of an administrative decision based on individual's legitimate expectation if a public authority has made a representation to the individual within its powers. The individual has to show that the representation was a clear and unambiguous promise, an established practice or a public announcement. This is largely a factual inquiry. (See *R v. North and East Devan Health Authority, ex parte Coughlan* [2001] QB 213 (CA)); *Nadarajah v. Secretary of State for the Home Department* [2005] EWCA Civ 1363).

[54] In this instant appeal, we agree with the submission of learned Senior Federal Counsel that although the appellant had travelled to Sabah in the past and on 8 April 2014 and she was allowed entry into Sabah without objection or obstruction; still that could not be made as a basis for the appellant to rely on the doctrine of legitimate expectation since:

(i) it was never stated in the appellant's affidavits as to the purpose of her past visit – whether it was for personal trip as a normal tourist or as a speaker in any forum pursuant to s. 67 of Act 155;

(ii) there was nothing in the appellant's affidavits to show that there was a promise or representation ever made by the respondents in the past that her entry to Sabah for the alleged purpose under s. 67 of Act 155 would not be refused. Following the dictum of Lord Fraser Tullybeltton in the case of *Council of Civil service Unions Minister Civil Service* [1985] AC 374, that legitimate expectation arises "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue", in our view, no substantive legitimate expectation arose in the appellant's favour.

(See also *Zakariah Ishak v. Majlis Daerah Hulu Selangor* [2005] 4 CLJ 77; [2005] 6 MLJ 517);

(iii) legitimate expectation cannot and should not override the express statutory power vested in the State Authority;

(See *North East Plantations Sdn. Bhd. v. Pentadbir Tanah Daerah Dungun & 1 Lagi* [2011] 4 CLJ 729 (FC) at p. 733); and

A (iv) it was misconceived for the appellant to argue that the impugned decision was in breach of her legitimate expectation given the express provisions of the Act 155 that such entry permit/pass was within the prerogative or discretionary power of the State Authority.

Conclusion

B

[55] For the foregoing reasons, we did not find any merit in the appeal. Accordingly, we had dismissed the appeal with no order as to costs. So ordered.

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